Mr. Hay stressed the force of the words "for the time being" in the definition of "proprietor" and argued that in Section 42 (iii) the word "void" should be taken to mean "voidable"—at the instance of an injured party which would include the Proper Registering Authority who could take action to have the memorial on the Register cancelled.

To so construe Section 42 (iii)—thus making the person whose name is actually on the Register the "Proprietor" as long as the memorial remains—could not injuriously affect any person, while the contrary construction would lead to much inconvenience.

On a strict construction of Section 42 (iii) one would never know at any given moment who really was the Proprietor. It would also be contrary to the definition of "Proprietor."

Again the "Proprietor" is the person liable to carry out the obligations of the title—to pay the rent, observe conditions and such like.

If, in a case like the present one, the person, being a real person, whose name is on the Register, is not to be treated as the Proprietor, who is to be so treated? Is it the Transferor who, in executing the Transfer, acted honestly and *bona fide?* It might be a great hardship to so regard him.

I come then to the view that in a case such as this the person entered on the Register i.e. the Plaintiff Halimah, is "for the time being" the Proprietor of the land.

I find support for this view in *Hogg's* Treatise entitled "Registration of Title to Land throughout the Empire."

At page 145 the learned Author writes in his Section dealing with "Forged and Invalid instruments" as follows:—

> "In the South Australian Enactment the registered 'certificate or instrument of title' is said to be 'void.' But in the Privy Council Judgment (**Gibbs v. Messer** (1891) A.C. 248) though the 'forged transfer or mortgage' is referred to as 'void' or 'a null deed,' it is said to be capable of becoming 'the root of a valid title in a **bona fide** purchaser' and the 'registered right of the transferee or mortgagee' is not treated as void but only as not 'indefeasible.' This suggests that the registration of the person taking under the forged instrument is better described as 'voidable,' the register being inconclusive for the time being. It would seem that only in such circumstances as occurred in **'Gibbs v. Messer'** where a merely fictitious name was placed on the register could the registration, that is the register entry and the certificate of title, be properly described as void and incapable of becoming 'the root of a valid title.'"

Order accordingly.

JOHORE REPORT.

[APPELLATE CIVIL JURISDICTION]

TERRELL, Ag. C.J., POYSER, C.J. F.M.S. & GORDON-SMITH, Ag. J.A.

October 5, 1940.

WEE BONG NEO (f), the Administratrix of LIANG ENG TOON, deceased

(Appellant—Respondent)

and

TAN JEE TEE

(Respondent—Applicant).

[CIVIL APPEAL No. 3 of 1940]

[J.B. ORIGINATING SUMMONS No. 32 of 1939]

Practice—receiver by way of equitable execution—application must be made in proceeding in which judgment obtained—when relief available—Procedure to set aside irregular appointment—F.M.S. Civil Procedure Code, Sections 298 and 299 not applicable—Jurisdiction under Section 597.

On the **ex parte** application of a judgment creditor an order had been made appointing his attorney receiver by way of equitable execution of the debtor's interest in certain immovable property. At the time of the application the debtor was dead. The application was made by Originating Summons in which the deceased debtor had been made the respondent. On a subsequent motion by the administratrix of the deceased debtor's estate asking to be substituted as respondent and for the earlier order to be set aside.

Held, that the application for the appointment of the Receiver should have been made in the cause or matter in which the judgment had been obtained, but that the procedure by way of motion to set aside the appointment was wrong and that application should have been made under Section 298 of the Civil Procedure Code. On appeal to the Court of Appeal.

Held, that since the order appointing the Receiver was made without jurisdiction and execution by such method clearly illegal, the appellant was entitled to have the order set aside **ex debito justitiae** by virtue of section 597 of the Civil Procedure Code.

Wai Seng Leng v. Chait Singh,(1) distinguished.

Case referred to:

(1) *Wai Seng Leng v. Chait Singh,* 8 M.L.J. 316.

ON MOTION before the Judge.

McIntyre for judgment Creditor.

S. G. Pillay for deceased debtor's administratrix.

Laville, Ag.J.—In this Originating Summons a judgment creditor Tan Jee Tee of the deceased Leong Eng Toon applied through his attorney Tan Kah Eur that the said attorney should be appointed receiver by way of equitable execution under section 275A of the Civil Procedure Code of the property of Leong Eng Toon for the purpose of realising the amount of the debt.

The application was made by Originating Summons under the provisions of section 472 of the Code. That section states any application to the Court in its civil jurisdiction not being between a plaintiff and defendant and not being in a pending suit or matter shall ordinarily be made by way of O.S. unless some other mode of procedure is prescribed by written law.

This application is not between a plaintiff and defendant nor in a pending suit or matter and therefore subject to there being no prescribed mode of procedure could be made by O.S. But it is clear from the Civil Procedure Code that a procedure has been prescribed. The application is essentially one for execution of a judgment debt and though under English law equitable execution is rather in the nature of relief than proper execution it has been held in *Blackman v. Fysh* (1892) 3 Chancery p. 209 to come within the term "Execution by process of law". In our Code the process of relief by way of equitable execution is clearly put on the same level as other methods of common law execution: section 275A is inserted in Chap. XXIV which is headed "Execution of Decrees" and under the sub-head "Mode of Execution". It is in my view impossible to reach any other conclusion than that an application for the appointment of a receiver under section 275A is an application for execution of a decree by that method. It follows that the procedure for obtaining such an order is the procedure laid down by Chap. XXIV of the Code, and is not by way of O.S. I am confirmed in this opinion by the ruling, in *Wai Seng Leng v Chait Singh*[1] that execution under section 275A is not the same as equitable execution in England. The Code lays down a clear and convenient procedure for applying for different methods of execution under Chap. XXIV, and in my opinion this procedure should be followed. I agree with the *dictum* in *Leonord v. Nachiappa Chettiar* at p. 268 F.M.S. Reports IV that on questions of procedure the analogies of English law should be followed with great caution and only if the local code has laid down no definite procedure to cover the point and an analogy from other parts of the Code is impossible or highly inconvenient.

It follows therefore that the application should have been dismissed for having been wrongly framed in that it was not made in the cause or matter which was the subject of the judgment sought to be satisfied, and in that the decrees in 2 separate judgments were consolidated without leave.

In other respects also the order was wrong, in that by appointing the agent of a creditor of the estate as receiver with power to realise his debt preference was given to one creditor over others which is contrary to law *vide Re Case* (1892) W.N. 142 and *In re Shepherd* 43 C.D. 131.

For these reasons I am of opinion it should be set aside. The point has been taken by respondent to the motion that the application to set it aside made by way of motion is incorrect. I agreed with him on this point: the application for appointment of a receiver being an application for execution as decided in *Wai Seng Leng v. Chait Singh*,[1] and execution in that form having been granted, an application to set it aside must follow the provisions of sections 298 & 299 Civil Procedure Code, and if it is out of time, an extension of time should be applied for.

In view of the fact that the procedure which should have been employed is one laid down by enacted law and is not a rule of Court I have no authority or precedent for relaxing the provisions of the law and must dismiss this motion. I do so, and give leave to applicant to make a fresh application in proper form after getting an extension of time. I direct that each party to this motion pay his own costs in view of the fact that the applicant, though he took the wrong steps, was induced to do so by the wrong form in which respondent had obtained his order.

As the original order for appointment of a reciever was made by the Supreme Court, the application for release of the land attached thereunder should be made in the Supreme Court also both on the merits and on the point that the Supreme Court had not jurisdiction to deal with the decree in the Segamat case unless it was remitted for execution to the Court.

In my view also notice of the fresh application should be given to Low Teng Jong the purchaser of the land from the present receiver Tan Kar Eur.

ON APPEAL to the Court of Appeal.

Johannes (S. G. Pillay with him) for administratrix—appellant.

Cobbett (M. V. Pillai with him) for Judgment Creditor—respondent.

Terrell Ag., C.J. (S.S.)—The history of this case is as follows:—One Liang Eng Toon died intestate on the 28th March, 1932, and was at his death the registered owner of an undivided half share in about 150 acres of land held under Johore Government Grant No. 9193 in the District of Segamat.

Prior to the death of Liang Eng Toon, Tan Jee Tee, the respondent on this appeal, had obtained two judgments against him, one in the Court of the Judge at Johore Bahru for $2,000 and interest, and one in the Magistrate's Court at Segamat for $341.87.

Nothing was ever paid in respect of either judgment, nor was any legal personal representative of Liang Eng Toon's estate appointed until his widow, the present appellant, was granted letters of administration after these proceedings had been commenced.

In April, 1939, the respondent issued an Originating Summons, No. 32 of 1939. The respondent to the originating summons was Liang Eng Toon, although the affidavit in support stated that he had died in Singapore about six years before. As there was no legal personal representative the application was heard *ex parte* before Mills J. on the 15th April, 1939, when the learned Judge made an order appointing the applicant's attorney to be a receiver by way of equitable execution of Liang Eng Toon's one half undivided share in Grant 9193 for the purpose of realizing the amounts due to the applicant in respect of the two judgments referred to above.

By a further order made by Mills J. on the 10th June, 1939, also made *ex parte,* the receiver was permitted to sell the interest in the land in question for $9,100, and was given liberty to satisfy thereout the said judgments, and the applicants costs as between solicitor and client.

Thereupon the appellant lodged a caveat which prevented the transfer to the purchaser being completed.

Then on the 18th November, 1939, the appellant filed a motion asking that she be substituted as respondent to Originating Summons No. 32 of 1939 and that the orders of the 15th April, 1939, and the 10th June, 1939, be set aside on the ground of irregularity.

There can be no doubt that the orders were grossly irregular for a variety of reasons some of which may be specified:—

(a) An application for execution must be made in the proceedings in which the judgment was obtained, and as there was a pending cause or matter the procedure by way of Originating Summons under section 472 was not applicable.
(b) There was no order to consolidate the Segamat Magistrate's suit with the suit in Johore Bahru.
(c) A person who is dead cannot be made a party to any proceedings.
(d) When a judgment debtor is dead, an application has to be made for leave to execute the decree against his legal personal representative (sections 260 and 264).
(e) Where more than a year has elapsed since the date of the decree, an application has to be made for leave to issue execution and notice served on the person against whom execution is applied for (section 264).

I have referred to certain of the more glaring defects in the procedure but I might also point out that under the English practice, which is relevant by virtue of section 275A (i), relief by way of equitable execution is not granted where the ordinary methods of execution are available, and that the procedure for attaching a registered interest in immovable property is regulated by section 294. Similarly the sale of immovable property attached in execution is regulated by section 319 and following sections which appear to have been disregarded.

These above observations show clearly that the orders were made entirely without jurisdiction. Laville J. before whom the motion was heard, was satisfied that the orders of Mills J. were wrong, but ruled that the appellant had adopted the wrong procedure in applying by motion to set them aside, and that an application should have been made under sections 298 and 299. The learned Judge considered that the case of *Wai Seng Leng v. Chait Singh*[1], a judgment of the F.M.S. Court of Appeal, was an authority for this proposition. In that case, however, the facts were very different. A party who was adversely affected by the order appointing a receiver by way of equitable execution, applied by motion for the appropriate relief and it was decided that the application should have been under sections 298 and 299. In that case there was no suggestion that the appointment of the receiver was not in accordance with the rules. Sections 298 and 299 are clearly applicable where the execution is *prima facie* legal, and there is a dispute on the merits.

In the present case the execution itself is clearly illegal and the appellant is entitled to have the orders set aside *ex debito justitiae.* There is ample jurisdiction under section 597 of the Code, and as Scrutton L.J. said in *Lazard Brothers & Co. v. Banque Industrialle de Moscou,* 1932, 1 K.B. p. 617 at p. 624: "If it comes to the knowledge of the Court that it has entered judgment in default of appearance against a man who was at the time dead x x x the Court is bound, after hearing the parties interested, of its own motion to set the judgment aside. Such a judgment is null and void". This reasoning applies with equal force to an execution which is clearly null and void.

The appeal, therefore, will be allowed. There will be an order that the appellant, as administratrix of Liang Eng Toon deceased, be substituted as respondent to the Originating Summons and that the orders of the 15th April, 1939, and the 10th June, 1939, be set aside. The appellant will be entitled to her taxed costs in the Court of Appeal and in the Court below and the deposit should be repaid to her.

Poyser, C.J. (F.M.S.)—I agree.

Gordon-Smith, Ag. J.A.—I concur.

Appeal Allowed.